No. 93-1437

(3)

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1993

GILFORD PARTNERS,
Petitioner,

vs.

RICHARD PIZITZ et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The respondents fail to address the merits of the issue raised in the petition for a writ of certiorari filed by Gilford Partners — whether personal jurisdiction properly can be based upon a legal fiction created by the forum asserting that jurisdiction. The respondents argue instead that the Alabama courts properly asserted jurisdiction over Gilford for reasons not stated in the opinion of the Supreme Court of Alabama. The writ is due to be granted because the decision below, by predicating jurisdiction on a fiction manufactured by the forum,

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*The Certificate of Interested Parties submitted with the Petition remains unchanged.

contravenes the Due Process Clause and this Court's precedents. The respondent has offered no justification for an extension of the long-arm reach of Alabama based on this fiction. Moreover, and contrary to the respondents' assertion, the record in this case affirmatively establishes that no other basis to assert jurisdiction over Gilford Partners exists.

i.

The Supreme Court of Alabama asserted jurisdiction over Gilford Partners based exclusively on a statutory fiction. That court concluded that jurisdiction was proper because Gilford Partners potentially committed tortious injury by acts or omissions "in this state" only because the Alabama securities provisions "deemed" the sale of the security to occur in Alabama.

The respondents' refusal to address the issue raised by the petition is conspicuous. The Supreme Court of Alabama thought the issue important enough to address and attempted, albeit unsuccessfully, to explain away the fiction. (*See* Appendix A to the Petition at A-4.) Somewhat surprisingly, the respondents do not try to defend the analysis of the Supreme Court of Alabama. Nor do the respondents offer any alternative analysis justifying the use of a legal fiction as a means to achieve personal jurisdiction over non-residents within the limits of the Due Process Clause.

Instead, the respondents suggest to this Court that the Alabama courts asserted jurisdiction over Gilford Partners based upon "Gilford's voluntary and purposeful activities directed to the State of Alabama. . . . " (Brief in Opposition at 3.) The Supreme Court of Alabama did not base jurisdiction on the contacts adverted to in the respondents' brief. The court's opinion contains no analysis of any of these purported contacts, because the

Alabama court based jurisdiction exclusively on the statutory fiction.[1]

There is no constitutional justification for the assertion of personal jurisdiction based on the fictional situs of the sale of a security under Alabama law. Because the Alabama court's holding violates due process, the writ should issue.

ii.

The respondents' suggestion that the Alabama court could have found that jurisdiction exists independently of the legal fiction demonstrably fails.[2] The respondents would predicate jurisdiction over Gilford Partners solely on correspondence and telephone contacts between the parties.[3] The respondents' assertion overlooks the affirmative evidence in the record that establishes beyond

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[1] The respondents' footnote 5 (indicating that the petition did not mention the correspondence or telephone contacts between the parties) is misplaced. The Supreme Court of Alabama based jurisdiction solely and exclusively on the fictional situs of the sale of the security — the issue raised in the petition for a writ of certiorari. That court never addressed the bases for jurisdiction asserted by the respondents in their brief to this Court. Nevertheless, as we demonstrate later in this reply, the contacts suggested by the respondents are insufficient bases to assert jurisdiction over Gilford Partners.

[2] In their Brief in Opposition (at 2-3), the respondents refer to claims of misrepresentation and fraud. However, the assertion of those claims does not bolster their jurisdictional argument. The claims were voluntarily dismissed at the trial court level. (C.R. 303.) Moreover, the respondents made no evidentiary showing before the trial court that jurisdiction properly could be asserted over Gilford based upon such claims, and the Supreme Court of Alabama never considered them.

[3] Telephone and correspondence contacts alone ordinarily have been held to be an insufficient predicate to support an assertion of jurisdiction. *See e.g., Charia v. Cigarette Racing Team, Inc.*, 583 F.2d

dispute that the *only* contacts between Gilford Partners and Alabama resulted from the unilateral activity of the Pizitzes. Respondent Richard Pizitz initiated the *first* contact with Gilford,[4] and *all subsequent contacts.* Other than routine periodic financial statements, all communications (including all correspondence and telephone contact) from Gilford Partners to the Pizitzes were in specific *response to a request by Richard Pizitz.*[5] (Pizitz Dep. p. 84-85, 113; Holmes Affd. ¶¶ 6, 7. (C.R. 20.)). It is undisputed that Gilford Partners never solicited any business in Alabama and has had absolutely no contact with this state apart from its response to the Pizitz overtures.

In this case the Pizitz partnership, which included partners from Alabama, California and Alaska, reached out to another state, Illinois, applied to Illinois to purchase an investment in a fund located there and sent a notice to Illinois to cancel the investment. Gilford Part-

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184, 187-88 (5th Cir. 1978); *Benjamin v. Western Boat Building Corporation*, 472 F.2d 723, 728-30 (5th Cir. 1973) and *General Elec. Credit v. Scott's Furniture Warehouse*, 699 F. Supp. 907, 912-913 (N.D. Ga. 1988).

[4] The respondents admit as much in their Brief in Opposition at 2.

[5] Mr. Pizitz testified that specific documents referred to by the respondents in their brief in opposition (at 2-3) were sent to him on his request. Those documents included the private placement memorandum, (Dep. p. 87), the agreement of limited partnership (Dep. p. 52), and the news clippings (Dep. p. 55). No documents, apart from the periodic statements, were sent to Pizitz without his first requesting them. (Dep. p. 86.) The respondents include no record citation for their statement that "Gilford's mail and phone contacts in this case were purposely designed to consummate the sale of an unregistered security in the State of Alabama. . . . " (Brief in Opposition at 8) because the statement is simply without any support in the record. However, Gilford's position that the respondents initiated all contact is amply supported by testimony from both parties.

ners' conduct was not directed toward Alabama. Rather, the petitioner only responded to the requests of the Pizitzes. Gilford Partners' passive acceptance of the Pizitz partnership's initiatives is precisely the type of conduct described by this Court as insufficient to support jurisdiction.[6]

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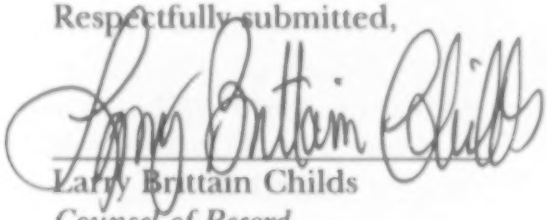
[6]This Court has underscored, in substance and in style, that the actions which support jurisdiction are those of the *defendant* — not of the plaintiff or the forum itself. Jurisdiction is properly asserted if the contacts "result from actions by the defendant *himself* that create a 'substantial connection' with the forum state." *Asahi Metal Ind. Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 109, 107 S.Ct. 1026, 1030, 94 L.Ed.2d 92 (1987) (emphasis in original). This substantial connection between the defendant and the forum state "must come about by *an action of the defendant purposefully directed toward the forum state.*" *Asahi*, 480 U.S. at 112, 107 S.Ct. at 1032 (emphasis in original). *See also, Burger King v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985).

CONCLUSION

The respondents' attempts to redirect the attention of the Court from the ruling of the Supreme Court of Alabama notwithstanding, the petition for a writ of certiorari is due to be granted. The decision below expands the jurisdiction of a single state beyond the proper bounds of Due Process. This Court should return uniformity to jurisdiction determinations by granting review and reversing the decision below.

Respectfully submitted,



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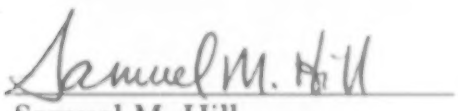

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